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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GARDEN GROVE DOWNTOWN BUSINESS ASSOCIATION,

Plaintiff and Appellant,

v.

CITY OF GARDEN GROVE et al.,

Defendants and Respondents;

SHELDON PUBLIC RELATIONS,

Real Party in Interest and Respondent.

G039843

(Super. Ct. No. 07CC02021)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

C. Robert Ferguson for Plaintiff and Appellant.

Stradling Yocca Carlson & Rauth, Allison E. Burns and Jennifer Yu for Defendants and Respondents.

Rutan & Tucker, John A. Ramirez and Robert O. Owen for Real Party in Interest and Respondent.

* * *

In January 2007, the Garden Grove Downtown Business Association (the Petitioner) filed a petition for a writ of administrative mandate challenging the approval by the City of Garden Grove (the City) and the Garden Grove Agency for Community Development (the Agency) of a condominium project (the Project) to be built on an existing parking lot in the historical downtown area of the City (the Site). The petition alleged that the approval process was unlawful because: (1) the City and the Agency failed to include the Garden Grove Parking and Main Street Commission (the Parking Commission) in the decision-making process for the Project; (2) the City abused its discretion by determining that the parking lot was no longer needed for parking; and (3) the City and the Agency abused their discretion in determining that the Project would eliminate blight.[1]

The developer and real party in interest, Sheldon Public Relations (Sheldon), moved to deny the petition. The City and the Agency joined. After reviewing the applicable statutes and the administrative record, the trial court determined that the City and the Agency complied with the law and their findings were supported by substantial evidence. Accordingly, it granted the motion to deny the petition.

FACTS

The Site is a public parking lot with 161 open spaces, located immediately behind the shops on the historic area of Main Street. Other adjoining land uses are Costco and Home Depot, senior housing, and a church. The lot had been owned by the City since 1982.

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[1] The petition also alleged notice violations, errors in valuation of the Project, and an unlawful disparity between the project description in the exclusive negotiating agreement and the project as finally approved. These contentions were either abandoned in the trial court or are not challenged on appeal.

In February 2006, the Agency and Sheldon entered into an exclusive negotiating agreement giving Sheldon six months to prepare a development proposal for the Site. The proposed Project consists of 100 condominiums, 12 of which are live-work units. The building will be five stories; parking will be on the ground floor and in a subterranean garage. "The project would provide a total [of] 346 parking spaces on-site, along Grove Avenue and Acacia Parkway. Of those spaces, 200 would be assigned parking and 146 would be open (shared-use business, guest and live work spaces). Of the 146 spaces, 88 would be located within the on-grade parking garage, 19 would be located on the southern end of the project site; 20 new spaces and 17 existing spaces would be located along Grove Avenue (shared-use guest spaces); and two (2) spaces would be located on the south side of Acacia Parkway adjacent to the project (shared-use guest spaces)."

In May 2006, the Parking Commission met. One of the items on its agenda was a speaker "about [the] proposed project in West parking lot." Apparently, the Commission had expressed concern that the Project had not yet been presented to it. The City staffer said, "[O]ne of the reasons that [the City] asked us to come was that you . . . were concerned that you hadn't heard [from] anyone and [so you could] hear exactly from the Developer . . . what it was because there was [*sic*] a lot of things floating out there. The other [reason] why Steve [Sheldon] wanted to come today was to get input. What it is that you think he can put in this project that would put your minds at ease, . . . whether it's making sure that there is parking or . . . other issues so that when he . . . make[s] additions or changes to his plans, that he knows that he's addressing something that you guys have concerns about. And that's what he'll say at the neighborhood meeting, when we hold the neighborhood meeting is what is it that these people in the neighborhood would like to see."

Sheldon presented general architectural renderings of the Project, and there was extensive discussion by the commissioners and the audience. At the end of the meeting, the Parking Commission unanimously moved to "send a letter to City Council and to the City expressing their concern that a . . . Request For Proposal[] to receive project plans on the noted property had not been implemented."

In July 2006, DKS Associates submitted a parking study that had been commissioned by the City. The study concluded that "the proposed project will accommodate the parking demands for both the current Main Street mixed use businesses and the guest parking demands of the condominium project. A total of 146 shared parking spaces will be made available to the Main Street merchants, condominium and live work guests. Additionally, the supply of parking available in the 11 lots is 446 spaces. This amount of parking insures there will not be a shortfall of parking for the merchants in the Main Street area. It should be noted that there are a sufficient number of spaces available in the surrounding area to meet demand even without the replacement of parking spaces in Lot 1 (project area) and Lot 2."

Also in July, Sheldon attended another Parking Commission meeting. He was not on the agenda but "wanted to update you as to our progress." He told the Parking Commission they had done parking studies and talked to the business owners. Community meetings were planned. Two days later, the Parking Commission sent a letter to the City complaining about being left out of the project approval process and asking to be included.

The Project was presented at a public hearing before the Planning Commission in August 2006. The Commission adopted resolutions recommending approval of the project and adopting a negative declaration under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.).

A public hearing on the Project was held before a joint meeting of the City Council and the Agency[2] on October 24, 2006. Notice of the hearing was published from October 12 through October 17. At the conclusion of the hearing, the Agency adopted a resolution approving a Disposition and Development Agreement (DDA) between it and Sheldon providing that the Agency would sell the Site to Sheldon for $1.5 million. The resolution also approved a Cooperation, Purchase and Sale Agreement between it and the City "whereby the City will sell the Site to the Agency in order to allow the Agency to dispose of the Site pursuant to the DDA." The City adopted a resolution approving the Cooperation, Purchase and Sale Agreement and the DDA, and authorized the Agency to enter into the DDA. The City adopted another resolution, finding that "[t]he entire Site is not and will not be needed for public parking uses . . . . [¶] . . . [¶] . . . The thirty-nine (39) new parking spaces to be created along Grove Avenue and Acacia Parkway will be available for joint use by the guests of residents in the Proposed Development, the businesses in the general area, and the public. [¶ . . . Approximately one hundred seven (107) of the parking spaces to be constructed as part of the Proposed Development will be available for joint use by the guests of residents in the Proposed Development, the businesses in the general area, and the public."

The City's resolution also found that "redevelopment of the Site is a public use in furtherance of the health, safety, and welfare of the citizens and the property owners of the City of Garden Grove. The devotion of the Site to the public use of redevelopment in furtherance of the Proposed Development is of general benefit to the area comprising the Vehicle Parking District because of the public benefits of eliminating blight and implementing the goals and objectives of the Redevelopment Plan,

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[2] The Community Redevelopment Law provides that a city council may appoint five members to a redevelopment agency board or "declare itself to be the agency; in which case, all the rights, powers, duties, privileges and immunities, vested by this part in an agency, except as otherwise provided in this article, shall be vested in the [city council]." (Health & Saf. Code, § 33200, subd. (a).) The Garden Grove City Council had made such a declaration.

enhancement of business and retail opportunities, provision of a high quality development, increase in property values and economic vitality for the Garden Grove Community Project, creation of new employment opportunities, and generation of increased tax revenues." In November, the City adopted the Negative Declaration and a Development Agreement between it and Sheldon.

## DISCUSSION

### *Standard of Review*

On a petition for writ of administrative mandate, the superior court reviews the agency's decision to determine "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) Absent the violation of a fundamental right, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) On appeal from the denial of a petition for a writ of administrative mandate, "'we review the administrative decision, not the superior court's decision, by the same standard – the substantial evidence test.' [Citations.] (Italics omitted.)" (*Kolender v. San Diego County Civil Service Commission* (2007) 149 Cal.App.4th 464, 470.) Questions of law, however, are reviewed de novo. (*Horwitz v. City of Los Angeles* (2004) 124 Cal.App.4th 1344, 1354.)

*Health and Safety Code section 33433*

Petitioner contends the sale of the Site from the Agency to Sheldon must be invalidated because the Agency failed to comply with Health and Safety Code section 33433. That section sets out procedural prerequisites to the sale of Agency-owned property for development, if that property was "acquired in whole or in part, directly or indirectly, with tax increment moneys . . . ." (Health & Saf. Code, § 33433, subd. (a)(1).) It requires a noticed public hearing and a report, available to the public, containing the proposed sale agreement, a summary of the costs and property values associated with the transaction, and "[a]n explanation of why the sale or lease of the property will assist in the elimination of blight . . . ." (Health & Saf. Code, § 33433, subd. (b)(2)(B)(iv).)

Petitioner claims the Agency failed to include an adequate showing that the Project will eliminate blight. The Agency contends section 33433 does not apply to its sale of the Site to Sheldon because there was no tax increment money involved in that transaction.

The trial court "assume[ed] without deciding" that section 33433 applied to the sale of the Site to Sheldon, then found the elements of the section were satisfied by the Keyser Marston report: "Nothing in 33433(a)(2) required the report to be made by Respondents. The Keyser Marston report adequately explains the costs, the value of the interest to be conveyed, the estimate of re-use value, etc. . . . While it is true there is no explanation regarding elimination of blight, that failure alone is not abuse of discretion and review of that issue is now time barred anyway." The trial court further found that "[r]eview of the blight determination made in the 1970's is subject to a 90 day statute of limitations. Health & Safety Code 33500." [3]

[3] The trial court appears to have been confused on this issue. Challenging the original determination of blight in the redevelopment plan (which the Petitioner may have been trying to do below but has abandoned on appeal) is not the same as challenging the explanation of how the Project will eliminate whatever blight exists today.

We find the sale of the Site from the Agency to Sheldon is not subject to section 33433. In 1979, the Agency purchased several privately owned parking lots with tax increment money; these lots comprise a portion of the Site. But in 1982, the lots were conveyed to the City as part of a real property exchange. The City and the Agency treated that transaction as subject to section 33433. The City resolution approving the transaction stated that the purpose of the conveyance was "to implement the Amended Redevelopment Plan." It also stated, "[P]ursuant to Section 33433 of the California Community Redevelopment Law [Health and Safety Code section 33000 et seq.], the Agency and the City Council held a duly noticed joint public hearing on the proposed conveyance of the subject real property and the proposed Agreement." After 24 years of ownership, the City transferred the Site to the Agency, which immediately sold it to Sheldon for $1.5 million.

Petitioner claims the transfers of the Site from the Agency to the City and back to the Agency again were internal transfers between interlocked entities. Thus, it argues, the City and the Agency were the alter egos of each other and should be treated as one entity.

In *Nolan v. Redevelopment Agency* (1981) 117 Cal.App.3d 494, the redevelopment agency of the City of Burbank had entered into a disposition and development agreement with a private developer. A citizen brought an action against the agency, alleging the sale of agency-owned real property to the developer was for less than its appraised value and therefore a waste of public property and that the agency did not follow correct procedures. After the action was commenced, the plaintiff discovered it should have named the City of Burbank and attacked its procedures under Health and Safety Code section 33433. The plaintiff's efforts to add the city as a defendant were barred by the statute of limitations. The trial court dismissed the action, concluding it

could not review the city's procedures because it was not named as a defendant. (*Id.* at pp. 497-499.)

The appellate court reversed the dismissal, finding that the city council had declared itself to be the agency under Health and Safety Code section 33200, and therefore the redevelopment agency and the city were one in the same. "[I]n a city which has created a redevelopment agency governed by a board other than the city council, the final approval for a sale [for redevelopment] may not be made on the approval of the Agency board alone. But in Burbank, where the city council is the agency, no such distinction exists." (*Nolan v. Redevelopment Agency*, *supra*, 117 Cal.App.3d at p. 501.)

In *Oceanside Marina Towers Assn. v. Oceanside Community Development Comm.* (1986) 187 Cal.App.3d 735, the trial court found a challenge to a negative declaration of environmental impact under CEQA was time barred because the notice of determination filed by the City of Oceanside was effective to start the running of the statute of limitations, notwithstanding that the community development commission was designated as the lead agency. The appellate court affirmed, observing that "the Oceanside City Council itself constitutes the Commission" and concluding "[i]n essence, then, the Commission is the alter ego of the City for redevelopment purposes." (*Id.* at p. 738.) "[W]e believe it would be a colossal elevation of form over substance were we to rule that the running of the statute of limitations depended on which of two participating agencies filed a notice containing exactly the same information with exactly the same county clerk." (*Id.* at p. 741.)

*Nolan* and *Oceanside Marina Towers Assn.* were criticized by *Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4th 1414. There, a developer sued the City of Coachella for breach of contract for allegedly failing to convey land for the development of an auto center and mall. The trial court sustained the city's demurrer on the ground that it was not a party to the contract; rather, the contract

was between the developer and the Coachella Redevelopment Agency. Citing *Nolan*, the developer argued the city and the agency were one in the same governmental entity.

The appellate court rejected *Nolan* and *Oceanside Marina Towers Assn.* "Redevelopment agencies are governmental entities which exist by virtue of state law and are separate and distinct from the communities in which they exist. . . . 'An agency may: (a) Sue and be sued. . . . (c) Make and execute contracts and other instruments necessary or convenient to the exercise of its powers.' [¶] General law cities . . . , on the other hand, exist by virtue of an entirely different body of law," i.e., the Government Code. (*Pacific States Enterprises, Inc. v. City of Coachella*, *supra*, 13 Cal.App.4th at p. 1424.) "[T]he legislative body which exercises local governmental power within a given jurisdictional territory (a community) may, if it so chooses, also exercise the powers of the redevelopment agency in that territory. *But*: When a 'dual capacity legislative body' acts as the governing board of a redevelopment agency, it is the redevelopment agency which is acting by and through that legislative body; and when that same legislative body acts as the governing body of the 'community' (i.e., city) over which it exercises local governmental powers, it is the 'community' which is acting by and through that legislative body. The redevelopment agency and the 'community' are *not* one and the same governmental entity. The redevelopment agency, by state law, exists 'in each community' with certain limited powers and functions (Health & Saf. Code, §§ 33020, 33100, 33120) – it is not the same entity as the community *within which* it exists." (*Id.* at pp. 1424-1425, fn. omitted.)

We agree with the reasoning of *Pacific States Enterprises* and find the Agency and the City were acting independently of each other. The transfer from the Agency to the City in 1982 satisfied the requirements of Health and Safety Code

section 33433, as it was then written,[4] for a sale of property acquired with tax increments. The subsequent transfer from the Agency to Sheldon in 2006 was pursuant to Health and Safety Code sections 33430 and 33431. Those sections provide that the Agency may sell property for the purpose of redevelopment after a properly noticed public hearing. The Agency held such a hearing in October 2006. The resolution adopted by the Agency at the end of that hearing found that the Project would "promot[e] a balance of new housing to meet the needs of the community and continu[e] to provide opportunities for mixed land use developments through the Planned Unit Development Process" and would "assist in the elimination of blight . . . ." [5]

*Government Code section 54222*

Petitioner contends if the Site is not considered to be Agency property, with Health and Safety Code section 33433 applying to the sale to Sheldon, then it must be considered City property subject to Government Code section 54222. Because the City found the Site was no longer needed for parking, it should be considered as surplus land. As such, Petitioner argues, the City was required to offer the Site first to other governmental entities for use as low-income housing, parks and recreation, schools, or other uses for the public benefit before it could be sold for private development. (Gov. Code, § 54222.) "Surplus land" is defined as "land owned by any agency of the state, or any local agency, that is determined to be no longer necessary for the agency's use, except property being held by the agency for the purpose of exchange." (Gov. Code,

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[4] Petitioner points out that subdivision (b)(2)(B)(iv) of section 33433, which requires a showing of the elimination of blight, was not enacted until 1993 (Assem. Bill No. 1290 (1993-1994) reg. Sess.) Oct. 8, 1993) 1290). Thus it was not in effect when the Agency transferred the Site to the City in 1982.

[5] Sheldon contends even if section 33433 applies to the sale of the Site, there is sufficient evidence in the record to show how the Project will eliminate blight. He offers these reasons: (1) The profitable reuse of underutilized land; (2) enhancing the downtown environment; (3) providing $450,000 of annual income to the Agency; (4) providing a one-time sale revenue of $1.5 million to the City; (5) helping to revitalize the downtown business area; (6) providing new housing opportunities in the area; (7) raising surrounding property values; and (8) providing Main Street businesses with a significant source of customers who live within walking distance.

§ 54221, subd. (b).) Petitioner contends the City knew the Site was surplus land and transferred it to the Agency to avoid having to comply with section 54222.

The City correctly points out that the Site was used for parking within a Vehicle Parking District formed under the provisions of the Vehicle Parking District Law of 1943 (Sts. & Hy. Code, § 31500 et seq.). Thus, it argues, the transaction between it and the Agency was governed by the provisions of the Streets and Highways Code, not the Government Code.

Streets and Highways Code section 31850 provides that the City "may sell or lease any property acquired for parking places which is not needed for that public use." After a public hearing, the City may determine "that any portion of property acquired for parking places is not needed for that public use . . . ." (Sts & Hy. Code, § 31851.5.) If such a determination is made, "the city may devote such property to some other public use which the legislative body [the city council; see § 31503] finds will be of general benefit to the area comprising the district." (*Ibid.*)

The City held a public meeting on October 24, 2006, then adopted a resolution determining that the entire Site was no longer needed for parking and devoting it to the public use of redevelopment. (See Health & Saf. Code, § 33037, subd. (c) [redevelopment of blighted areas and the provisions for appropriate continuing land use and construction policies in them constitute public uses].)

Petitioner argues the Vehicle Parking District Law does not apply to relieve the City of its obligations under Government Code section 54222 because the public purpose of redevelopment is not being carried out by the City, but by the Agency.

Although the Agency will be carrying out the public purpose of redevelopment, the City devoted the Site to the public purpose of redevelopment by transferring it to the Agency. The City properly determined that redevelopment was the best public use for the Site. The only way the redevelopment could be accomplished was

by selling the Site to the Agency. **"**For the purpose of aiding and co-operating in the planning, undertaking, construction, or operation of redevelopment projects located within the area in which it is authorized to act, any public body, upon the terms and with or without consideration as it determines, may: [¶] (a) Dedicate, sell, convey, or lease any of its property to a redevelopment agency." (Health & Saf. Code, § 33220, subd. (a).)

*Role of Parking Commission*

Petitioner contends the approval process for the Project is invalid because the Parking Commission was bypassed, arguing the Parking Commission should have been the first step in a three-part review of the Project. The Petitioner complains the May 11 meeting was merely an introduction to the Project, whereas it should have been a complete review of the design plans, followed by recommendations to the Planning Commission and the Agency.

The Vehicle Parking District Law provides for the appointment of a parking place commission by the City upon the formation of the district and the acquisition of parking places. (Sts. & Hy. Code, § 31770.) The commission "shall have possession and complete charge, supervision and control" of the District parking places (§ 31779) and "shall operate, manage, and control the parking places and make and enforce all necessary regulations for their use." (§ 31780.) The Garden Grove Municipal Code provides that the duties of the Parking Commission include "review[ing] proposed building design plans and site plans and make recommendations to the Planning Commission and the Agency . . . , as appropriate, relative to the approval, denial, or modification of the plan based upon its conformance with the regulations and criteria of the Main Street Historical-Retail Combining Zone . . . ." Petitioner argues these sections clearly require that the Parking Commission have an active role in the Project approval process because it involves a change in parking spaces.

The trial court found, "[Streets and Highways Code sections] 31779 and 31780 pertain to Parking Commission possession and control once the parking places are established, not Parking Commission involvement in site planning." With respect to the Garden Grove Municipal Code, the trial court found, "090(b) indicates one of the Parking Commission's 'duties' is to review proposed building design plans. . . . The Parking Commission is to make recommendations as appropriate, but nothing in 090(b) mandates the Planning Commission or the Agency to consider those recommendations or even solicit them. [¶] It also appears the Parking Commission was aware of the Project no later than the May 11, 2006 meeting, at which Real Party presented the draft elevation drawing and plans. The 7-15-06 Parking Commission Letter complained 'the proposed project plans have not been presented before the commission' but nothing in 090(b) requires the City to 'present' the [proposed project] plans, and the Petition is silent as to what, if anything, the Parking Commission did after 7-15-06 to fulfill its 'duty.'"

The Parking Commission did not have the power to block the approval of the Project, merely to make recommendations. And if recommendations had been made, neither the Agency nor the City was obligated to consider them. Consequently, if any error exists, it is not prejudicial to the Petitioner's rights.

*Evidence of Excess Parking*

Petitioner contends Streets and Highways Code section 31851.5 requires the City to find a specific portion of the Site was not needed for parking, and then it could devote only that specific portion to another public use, not the part that is still needed for parking. The Petitioner claims that the City's determination that the *entire* Site is not and will not be needed for public parking uses is not supported by the evidence, pointing out that the DKS Study concluded the Site *was* needed for parking.

Section 31851.5 provides in part: "Whenever the legislative body determines that any portion of property acquired for parking places is not needed for that

public use, the city may devote such property to some other public use which the legislative body finds will be of general benefit to the area comprising the district. . . ."

The City found the Site was underutilized for parking, meaning not all the parking spaces were needed. Consequently, it devoted the entire Site to a mixed use, which includes sufficient parking. The Site currently has 161 public parking spaces; after the Project is implemented, it will have 146 public parking spaces. Section 31851.5 does not require the delineation of that part of the parking lot which contains the 15 excess spaces and allow only that portion to be devoted to another public use.

Petitioner contends the DKS Study is flawed and incomplete, thus it does not constitute substantial evidence to support the reduced number of parking spaces. Petitioner attacks the study's findings with conflicting facts and arguments presented by opponents to the Project. This is nothing more than an attempt to reargue the evidence, an exercise in which we will not engage on appeal.

## DISPOSITION

The judgment is affirmed. Respondents and real party in interest are entitled to their costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.